IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, MISSISSIPPI

Mississippi Supreme Court Case No. 2015-DR-00591-SCT
Circuit Court of Montgomery County, Mississippi, Cause No. 2003-0071-CR

CURTIS GIOVANNI FLOWERS A/K/A CURTIS FLOWERS A/K/A CURTIS G. FLOWERS — *Petitioner*

v.

STATE OF MISSISSIPPI — *Respondent*

MOTION FOR MANDATORY DISCOVERY AND FOR LEAVE TO OBTAIN DISCOVERY

Comes now Petitioner, Curtis Giovanni Flowers, through his counsel, and respectfully moves pursuant to Mississippi Rule of Appellate Procedure 22(c)(4)(ii) to compel mandatory discovery from the State and related law enforcement agencies, and to seek leave to obtain discovery from other third parties.

Time and again, the State has told this Court that it has turned over everything it has relating to the investigation of the Tardy murders. New evidence uncovered by Mr. Flowers and independent investigative journalists, however, shows that there is far more to the story than what the State has disclosed. And these missing pieces are directly relevant to Mr. Flowers's claims for post-conviction relief, including his *Brady*, *Batson*, and ineffective assistance of counsel claims. To ensure that Mr. Flowers has a complete record from which to develop his post-conviction petition, this Court should order the following discovery.

Mr. Flowers first requests documents relating to alternative suspects (Section A). Recent discoveries show that the State actively investigated suspects from Alabama who committed a string of markedly similar robbery-murders around the time of the Tardy murders, as well as a local man with a long criminal history who wore the same type of shoes that allegedly left prints

at the crime scene. Yet there is hardly a mention of these suspects in the files that the State produced, and the State has repeatedly claimed that there were no alternative suspects. To allow Mr. Flowers to develop his *Brady* and *Napue* claims relating to this suppressed evidence, the Court should now require full disclosure from the State and permit relevant third-party discovery.

Mr. Flowers also requests discovery relating to Odell Hallmon (Section B), the State's "jailhouse snitch" who testified that Mr. Flowers confessed to committing the Tardy murders. We now know that Mr. Hallmon's testimony was false; he recently recanted his story in a recorded interview. We have also learned that Mr. Hallmon gave this testimony as part of a longstanding quid pro quo relationship with the State, in which he would testify falsely in exchange for leniency in his own cases. The requested discovery would further undermine the State's theory of the case and establish that the State's failure to disclose its deals with Mr. Hallmon violated *Brady*.

Next, Mr. Flowers requests discovery about a .380 caliber gun—the same caliber allegedly used to commit the Tardy murders—found under a house just a few hundred yards from Tardy Furniture, in the opposite direction from the route that the State argued Mr. Flowers took on the day of the murders (Section C). New evidence, including interviews with Winona law enforcement, indicates that law enforcement took possession of the gun and then turned it over to the District Attorney's office. Once again, however, there was no mention of this evidence in the files disclosed by the State. The requested discovery would not only severely undermine the State's theory of the case, but also establish that the State's failure to disclose any evidence relating to the gun violated *Brady*.

Mr. Flowers also requests discovery that would support his *Batson* claim (Section D). New statistical evidence shows that in trials prosecuted by District Attorney Doug Evans and his colleagues, black jurors were more than four times more likely to be struck than white jurors. This clear pattern of racial discrimination reinforces that racial bias infected the jury-selection process in Mr. Flowers's trial. Particularly in light of the Supreme Court's recent decision in *Foster v. Chatman* emphasizing the importance of the prosecution's jury-related documents for establishing a *Batson* claim, the Court should grant Mr. Flowers's requests for those documents, as well as other discovery relating to Mr. Evans's pattern of misconduct.

Additional discovery is also relevant to Mr. Flowers's claims of prosecutorial misconduct. Mr. Flowers requests discovery relating to new evidence showing that the State fabricated witness statements and testimony implicating Mr. Flowers (Section E). Mr. Flowers also requests discovery regarding Patricia Sullivan-Odom (Section F) to inform claims that, consistent with other new evidence of misconduct, the State biased her testimony and then failed to disclose that bias to the defense. Other requests relating to law enforcement records and investigations (Section G) are not only material to Mr. Flowers's *Brady* claims, but also could lead to new evidence of actual innocence.

Finally, Mr. Flowers's requests for his custodial record over the 13 years he was held prior to his sixth trial (Section H) would establish his passivity and good behavior, and are relevant to his claim that trial counsel rendered deficient performance by failing to request those records previously.

Many of these discovery requests have never been addressed by this Court.[1] Some of them, however, were previously denied by the Court during a January 2016 hearing on prior discovery motions. The Court should reconsider those requests now for two reasons. First, the Mississippi Supreme Court has ordered Mr. Flowers to begin the post-conviction process anew, including pre-petition discovery, based on the high court's new mandate on direct appeal. In these new proceedings, the Court is free to reconsider prior rulings. Second, the Court should reconsider those rulings in light of the new evidence discussed above, which dramatically changes the discovery analysis.

Mr. Flowers makes this motion pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 3, Sections 14, 23, 24, 25, 26 and 28, Miss. Code Ann. § 99-39-101 *et seq.*, M.R.A.P. 22, including Rule 22(c)(4)(ii), and other applicable state and federal law. In support of the motion, Mr. Flowers apprises the Court of the following:

Background and Procedural History

Curtis Flowers has been tried six times by the same prosecutor for a quadruple homicide that occurred on July 16, 1996 at Tardy Furniture Store in Winona, Mississippi. Each of the first three trials resulted in a conviction and death sentence, but was subsequently reversed by the Supreme Court of Mississippi due to prosecutorial misconduct. In reversing the third conviction, the Mississippi Supreme Court expressed its concern that the State would "persist in violating the principles of *Batson* by racially profiling jurors." *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007) (hereinafter "*Flowers III*"). The fourth and fifth trials ended in mistrials because jurors

[1] Attached as Appendix A is a table indicating the procedural history of each discovery request discussed herein, including whether it was previously raised and addressed by this Court on prior motions.

were unable to agree on a verdict. The sixth trial, in which the State struck all but one of the African-American jurors tendered, resulted in Mr. Flowers's conviction on June 19, 2010.

The Mississippi Supreme Court affirmed Mr. Flowers's conviction and sentence on direct appeal on November 13, 2014, and denied rehearing on March 26, 2015. The mandate issued on April 2, 2015, and Mr. Flowers began post-conviction proceedings in this Court.

Post-Conviction Discovery After The Mississippi Supreme Court's Initial Mandate

During the summer of 2015, Mr. Flowers attempted to begin discovery by requesting mandatory discovery pursuant to Rule 22 from the District Attorney, including "the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the murders . . . and the prosecution of the [Mr. Flowers]." *See* Ex. 1 at 4, 6 (Disc. Requests).[2] Also under Rule 22, Mr. Flowers requested records directly from several law enforcement agencies, including the Montgomery County Sherriff, the Winona Police Department, the Mississippi Highway Safety Patrol, the Mississippi Bureau of Investigation, and the Montgomery County Medical Examiner. *See generally id.* The law enforcement agencies claimed that they had no responsive records at all, produced minimal records, or referred requests to the District Attorney. The District Attorney's office, in turn, omitted many key documents in its response, including jury selection documents central to Mr. Flowers's *Batson* claim.

On September 18, 2015, Mr. Flowers filed a Motion for Leave to Seek Discovery related to his post-conviction claims. *See* Ex. 2 at 1-12 (Mot. for Leave to Seek Disc. (Sept. 18, 2015)).[3] On October 19, 2015, Mr. Flowers also moved to compel the State to complete its production obligations. Specifically, in these motions Mr. Flowers sought: (1) documents related to jury selection; (2) communications between investigators and other law enforcement entities related

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2 Copies of the discovery requests referred to herein are attached as Exhibit 1 hereto.

3 Copies of prior discovery motions referred to herein are attached as Exhibit 2 hereto.

to alternative suspects; (3) documents related to firearms and ballistics; (4) communications between the District Attorney's office and a former member of *Flowers* prosecution team, Mark Horan, who abruptly began representing key witness Patricia Sullivan-Odom[4] in federal criminal proceedings; (5) leave to Depose Patricia Sullivan-Odom; and (6) leave to depose the relevant law enforcement records custodians who claimed to not have records. *See* Ex. 2 at 14-32 (Mot. to Compel Produc. of Mandatory Post-Conviction Disc. (Oct. 19, 2015)).

At a hearing on the motions on January 29, 2016, the State repeatedly claimed that the District Attorney did not have many of the documents that Mr. Flowers had requested. *See* Ex. 3 at 57 (Disc. H'rg Tr. (Jan. 29, 2016)) ("Everything that is there is in the court file. There is nothing else that we can give them."). The State also asserted that the same was true of any agency or employee of Mississippi:

> BY THE COURT: Okay. I will just ask: Does the State possess any information on any other suspects or any communication with anybody that has not been provided?
> BY MR. SMITH: I am unaware of that.
> BY MR. EVANS: No, sir.
>
> *Id.* at 48-49.
>
> BY THE COURT: Does this extend to all law enforcement agencies?
> BY MR. EVANS: Everything I've got. Everything that is in the file.
> BY THE COURT: And I believe all others have said they turned over everything they had to you. So we've got the assurance from the State of Mississippi that there was no records of anything dealing with other perpetrators or anything of that nature; is that correct?
> BY MR. EVANS: Yes, sir.
> BY MR. SMITH: Yes, sir.
>
> *Id.* at 49.

Based in part on these claims, the Court denied Mr. Flowers's motion for subpoenas and to compel the State to produce further documents. The Court also agreed to review the requested

[4] Ms. Sullivan-Odom has been referred to by different last names: "Patricia Sullivan Odom" in *Flowers VI*, "Patricia Hallmon Sullivan" in *Flowers III* and in prior discovery motions.

jury-selection documents *in camera*. On February 10, 2016, the Court issued an order finding that those documents evinced no racial bias and therefore needed not be produced.

Mr. Flowers filed a Motion for Mandatory Discovery and for Leave to Seek Discovery on March 16, 2016, seeking additional mandatory disclosures by the State and issuance of subpoenas. *See* Ex. 2 at 34-44 (Mot. for Mandatory Disc. and for Leave to Seek Disc. (Mar. 16, 2016)). On March 17, 2016, Mr. Flowers filed with the Mississippi Supreme Court a Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief. On Mr. Flowers's unopposed motion, the Mississippi Supreme Court then stayed post-conviction proceedings to allow Mr. Flowers to pursue discovery. On July 29, 2016, in light of the United States Supreme Court's intervening decision in *Foster v. Chatman*, Mr. Flowers filed a renewed motion in this Court to compel production of *Batson* materials. *See* Ex. 2 at 46-60 (Renewed Mot. to Compel Produc. of Mandatory Post-Conviction Disc. in Light of New Decision from the United States Supreme Court (July 29, 2016)). On December 12, 2016, following the Supreme Court's grant of Mr. Flowers's petition for certiorari and remand, the Mississippi Supreme Court extended its stay on post-conviction proceedings. Accordingly, this Court took no action on the two pending discovery motions.

Investigative Reporting By American Public Media

Meanwhile, in addition to the investigation we are conducting as Mr. Flowers's counsel, a team of reporters for APM spent a year in Winona, Mississippi investigating this case.[5] Ex. 4-A at 1-2 (Affidavit of Rehman Tungekar (Nov. 30, 2018)) (*In the Dark* Episode 1 Tr.). The reporters published the results of their investigation between May 1, 2018 and July 3, 2018 in an audio series called "In the Dark," which included several shocking revelations that no prior

[5] APM has won some of the most prestigious awards in journalism. Indeed, the organization won the Peabody Award for its "In the Dark" series, the second season of which covers this case. *See In the Dark (APM Reports)*, Peabody (2016), http://www.peabodyawards.com/award-profile/in-the-dark.

counsel could have reasonably uncovered. *See generally In the Dark Season Two*, APM Reports (2018), https://www.apmreports.org/in-the-dark/season-two.

Odell Hallmon. This investigative series from APM revealed for the first time that Odell Hallmon recanted the testimony he gave in four trials that Mr. Flowers confessed to committing the Tardy murders. *See* Ex. 4-D at 6 (*In the Dark* Episode 6 Tr.). Mr. Hallmon explained, in a recorded interview, that he had given this testimony at Mr. Flowers's trial in exchange for leniency from the District Attorney. *Id.* at 4-5. The journalists also released previously undisclosed law enforcement records showing a pattern of backroom deals between Mr. Hallmon and the District Attorney, both before and after Mr. Flowers's sixth trial. Ex. 4-C at 5-18 (*In the Dark* Episode 5 Tr.).

Willie James Hemphill. In addition, the APM reporters undertook a multi-month, multi-state search for a man named Willie James Hemphill, and their report revealed that prosecutors and prosecution witnesses flatly lied when they claimed Mr. Hemphill was not a suspect in the Tardy murders. *See* Ex. 4-F at 7-8, 10-11, 15-23 (*In the Dark* Episode 10 Tr.). Indeed, at trial the District Attorney told the Court that Mr. Hemphill was so irrelevant to the investigation that he could not remember him by name. *Id.* at 8. The District Attorney's investigator, John Johnson, similarly claimed that the State ruled him out as a suspect in about five minutes. *Id.* And the only document relating to Hemphill disclosed to the defense was a one-page Miranda waiver form indicating that he was interviewed on July 21, 1996. *See* Ex. 5 (Criminal Investigation Bureau Interrogation; Advice of Rights Waiver of Rights: Willie James Hemphill (July 21, 1996)).

Based on the APM investigation, we now know that the State actually considered Mr. Hemphill to be a serious suspect. We now know that at the time of the Tardy murders,

Mr. Hemphill had been staying in a house a few blocks from Tardy Furniture, had a long criminal history, and wore the same type of shoes that allegedly left prints at the crime scene. *See* Ex. 4-F at 10-11, 15-23 (Ep. 10 Tr.). We now know that just a few days after the murders, law enforcement launched a large-scale manhunt for Mr. Hemphill. *Id.* at 18-23. Six police officers reported to Mr. Hemphill's parent's home to ask his parents about his whereabouts. *Id.* at 19. Similarly, a "yard full" of investigators questioned Mr. Hemphill's cousin—a man who shares Mr. Hemphill's name and who lives only a half hour from Winona. *Id.* at 11-12. Hemphill was then interrogated not for just five minutes but for several hours, during which law enforcement took notes, made recordings, took Mr. Hemphill's shoes for testing, fingerprinted him, and tested his hands for residue or blood spatter. *Id.* at 20-22. They then jailed Mr. Hemphill for eleven days. *Id.* at 22. This investigation would have produced a mound of documentation, including interview notes, a recording of the interrogation, and reports of collecting evidence from Mr. Hemphill's shoes and person. *See id.* at 20-23. Yet the only disclosure to the defense was the single-page Miranda waiver form. *Id.* at 17.

The Undisclosed .380. The APM reporters also interviewed Jeffrey Armstrong, who recounted the same events that Mr. Flowers brought to this Court's attention in his January 29, 2016 discovery hearing: Mr. Armstrong found a .380 caliber gun in the crawl space under his mother's house near Tardy Furniture in 2001. Ex. 4-G at 1 (*In the Dark* Episode 11 Tr.). He turned it over to law enforcement, noting that it matched the profile of the murder weapon. *Id.* at 2. Although law enforcement has never produced any records about this event or the gun, the APM report included a statement from Winona Police Captain Dan Herod, who confirmed that Mr. Armstrong found the gun he said he found and turned it over to law enforcement authorities.

Id. at 3-5. According to Captain Herod, the gun was most likely turned over to the District Attorney's office. *Id.* at 5.

The Alleged "Timeline." Further, the APM reporters interviewed several witnesses crucial to the prosecution's alleged "timeline," people who claimed at trial that they saw Mr. Flowers on the day of the Tardy murders. Many told APM that their testimony was false and that the District Attorney's investigator, John Johnson, implied that they would receive a reward, assured them that someone else had already identified Mr. Flowers at the relevant date and time, and successfully pressured them to repeatedly give that false testimony. *See, e.g.*, Ex. 4-B at 10-17, 20 (*In the Dark* Episode 2 Tr.).

***Batson* Violation.** Finally, APM gathered 26 years' worth of data on juries in the Fifth Circuit Court District, where Mr. Evans is the District Attorney, to examine his office's history of striking jurors. APM described the process for collecting this information as "arduous"—for example, it involved scouring records at each of the eight courthouses in the district, the Mississippi Department of History and Archives, and the Mississippi Supreme Court Archives, and scanning more than 115,000 pages of court records and jury selection transcripts. Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APM Reports: In the Dark (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/. The investigators found that prosecutors were more than four times more likely to exclude black jurors than white jurors. *Id.* They also discovered that race was one of the most powerful indicators of which jurors would be struck, even after controlling for other race-neutral variables. *Id.* This evidence confirms Mr. Flowers's own investigation, which showed that in his capital cases, Mr. Evans was more than eight times more likely to strike qualified jurors if they were black than if they were white, and in his six trials of Curtis Flowers,

he was 20 times more likely to strike a juror who was black than one who was white. *See infra*, Section D.

Post-Conviction Discovery After The Mississippi Supreme Court's New Mandate

Because the United States Supreme Court vacated the Mississippi Supreme Court's first judgment, the Mississippi Supreme Court was compelled to reconsider the case and issue a new opinion. On November 2, 2017, the Mississippi Supreme Court affirmed Mr. Flowers's conviction and sentence on the trial record. *See Flowers v. State*, 240 So. 3d 1082 (Miss. 2017). The mandate issued on March 1, 2018. Mr. Flowers again sought certiorari on direct appeal in the United States Supreme Court, which was granted on November 2, 2018.

On October 18, 2018, after receiving briefing from the parties, the Mississippi Supreme Court confirmed that its new mandate required a new post-conviction petition, and that the deadline for seeking leave to file a post-conviction petition on the new mandate was February 28, 2019. *See* Order at 3, *Flowers v. State*, No. 2015-DR-00591-SCT (Miss. Oct. 18, 2018) [hereinafter "Order"]. The Mississippi Supreme Court also noted that "[Mr. Flowers] is entitled to proceed under M.R.A.P. 22" until filing an application for leave to petition for post-conviction review in this Court. *Id.* at 2.

Thus, pursuant to Mississippi Code Annotated Section 99-39-1 *et seq.*, and Rule 22 of the Mississippi Rules of Appellate Procedure, Mr. Flowers files the present motion seeking post-conviction discovery from the State. The motion encompasses discovery requests that this Court addressed in prior proceedings, those that were raised but not decided in prior proceedings, and new requests based on recent revelations.

Legal Principles

Mr. Flowers is entitled to discovery. *Brown v. State*, 88 So. 3d 726, 730 (Miss. 2012) (holding that Rule 22 discovery is necessary to "allow a petitioner to gather information to support an application to the Supreme Court for leave to file a motion for post-conviction relief in the trial court). Mississippi Rule of Appellate Procedure 22(c)(4)(ii) automatically entitles a petitioner to be provided with "the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner." Rule 22(c)(4)(ii) also entitles a petitioner to discovery or compulsory process where "such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief." *See also Russell v. State*, 819 So. 2d 1177, 1178-79 (Miss. 2001). Those criteria are met here.

Argument and Discovery Sought

The following specific discovery requests are mandatory under Rule 22(c)(4)(ii) or are likely to be helpful in adjudicating the post-conviction issues described. Discovery is particularly important in this case for two reasons not often present in cases like this. First, the State has made outright misrepresentations to Mr. Flowers and this Court about the scope of materials that are—or should be—in its possession. The Court therefore should not take the State at its word about whether additional relevant information exists. Second, based on Mr. Flowers's investigation and that of the APM reporters, the State's case against Mr. Flowers has come apart. Its story about Mr. Flowers's whereabouts on the morning of the Tardy murders has been shown to be a fantasy that the prosecution concocted and brought to life by manipulating "witnesses" and their statements. Its claim that there were no alternative

suspects with connections to the crime has likewise proved to be false. Its purported ballistics evidence based on bullets from a never-recovered gun has been severely undermined by the discovery and apparent suppression of a likely murder weapon. And its coup de grace, a claim that Mr. Flowers confessed to the crime, has been emphatically denied by the State's star witness, who has explained that he only gave the testimony as part of a deal with the State to save his own skin. The requested discovery is therefore warranted to allow Mr. Flowers an opportunity to flesh out his compelling claims for post-conviction relief.

The Court's order compelling or permitting discovery should extend not only to discovery requests that it has not yet addressed, but also to those that were denied during Mr. Flowers's initial post-conviction proceedings. Procedurally, the Mississippi Supreme Court's new March 1, 2018 mandate begins Mr. Flowers's post-conviction review anew, as the Mississippi Supreme Court recognized by setting a new post-conviction petition deadline and permitting Mr. Flowers to proceed under Rule 22, which includes an opportunity for discovery. *See* Order at 2-3. These new proceedings will replace the prior post-conviction proceedings that were premised on the first direct-appeal mandate, which has been vacated. *See Puckett v. State*, 834 So. 2d 676, 677 ¶ 6 (Miss. 2002) (recognizing that a death penalty conviction is only final and subject to post-conviction review after the state appellate review is complete); *cf. Magwood v. Patterson*, 561 U.S. 320, 323, 342 (2010) (finding federal habeas petition following new sentencing in state court should be considered an initial petition, not a second or "successive" petition). This Court is therefore free to reconsider its discovery rulings made in the now-defunct prior proceedings.

And there is good reason to do so. Significant new information that Mr. Flowers recounts in the present motion, along with subsequent United States Supreme Court decisions,

provide even stronger grounds for Mr. Flowers's discovery requests than existed nearly three years ago. In several instances, it is now clear that the State has, or should have, evidence that it told this Court did not exist. These circumstances demand a fresh look at Mr. Flowers's prior requests. Indeed, even absent a new procedural posture, courts regularly reconsider discovery rulings in light of new evidence and intervening changes in the law. *See, e.g.*, *Norman v. Elkin*, 860 F.3d 111, 127 n.21 (3d Cir. 2017) ("The District Court was therefore entitled to reconsider its decision in light of the new evidence . . . and in order to correct an erroneous ruling."); *Hill v. Int'l Paper Co.*, 121 F.3d 168, 177 (5th Cir. 1997) (vacating lower court judgment due to a mid-course change in Mississippi law and remanding for new proceedings consistent with the law); *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21, 34 (1st Cir. 1997) (remanding decision for new submissions in light of an "intervening clarification of the law"); *Napoli v. Sears, Roebuck & Co.*, 858 F. Supp. 101, 102 (N.D. Ill. 1994) (providing that renewed motions are appropriate after an intervening court decision or new evidence comes to light).

Accordingly, Mr. Flowers respectfully requests that the following discovery requests should be granted.

A. Discovery Related to Alternative Suspects

New evidence indicates that, having told this Court and the jury that there were no other suspects in the Tardy murders, the State has failed to produce documents relating to not one but two separate investigations of alternate suspects. The first investigation centered on three men from Alabama—Marcus Presley, LaSamuel Gamble, and Steven McKenzie—who in July and August of 1996 were wanted for murders markedly similar to the Tardy murders. The second investigation focused on a local man—Willie James Hemphill—who stayed three blocks from Tardy Furniture, had a long criminal history, and wore the same type of shoes that left a print at

the crime scene. The State should have produced documentation relating to both investigations at trial, pursuant to its *Brady* obligations, and in post-conviction proceedings, in response to Mr. Flowers's discovery requests. It did neither.

Here's what we know about the State's investigation of the Alabama suspects. In July and August of 1996, Presley, Gamble, and McKenzie were wanted for a string of murder-robberies in Alabama. As in the Tardy murders, the Alabama suspects were known to use a .380 handgun that jammed, robbed stores in broad daylight, and murdered the store clerks execution-style. *See* Ex. 6 at 1148, 1198-99, 1201, 1386, 1883-84 (Tr. of *State v. Gamble*, Case Nos. CC-96-813, CC-96-814 (Ala. Cir. Ct. Nov. 17, 1997)); *see also* Ex. 7 at 1140-41 (Tr. of *State v. Presley*, Nos. CC-96-815, 816 (Ala. Cir. Ct. 1997)). One of them was also known to wear Fila shoes. Ex. 6 at 1955 (Tr. of *State v. Gamble*). Picking up this lead, Mississippi investigators contacted officials in Boston, Massachusetts, and Norfolk, Virginia, about Presley and Gamble, who were on the run and ultimately apprehended in those jurisdictions. *See* Ex. 8 (MS Crime Lab., Microanalysis Section, Case Activity) (showing transfer of information from Mississippi Crime Lab to Boston authorities); Ex. 9 at ¶ 6 (Aff. of David Mark Goldberg (Jan. 20, 2016)). Mississippi investigators sent a copy of the Fila shoeprint recovered from Tardy Furniture to the lead investigator on Presley and Gamble's case at the Boston Police Department. *See* Ex. 8 (Microanalysis Section). Further, Lieutenant Wayne Miller of the Mississippi Highway Patrol requested and received a photograph of Marcus Presley from Detective David Goldberg in Norfolk, Virginia, *see* Ex. 9 at ¶ 7 (Goldberg Aff.), and used this photo in the Tardy Furniture investigation by including it in the photo array shown to Porky Collins on August 24, 1996, *see* Ex. 10 (State's Color Photo Lineup and Side-by-Side Comparison). *See also* Ex. 11 at ¶ 22 (Aff. of Marcus Presley (Nov. 16, 2015)); Ex. 12 at ¶ 5 (Aff. of Dr. Guodong Guo (Jan. 26, 2016)).

Later, in August 1996, investigators showed the daughter of victim Bertha Tardy photographs of jewelry recovered from investigations of Presley, Gamble, and McKenzie and asked if she recognized it. *See* Ex. 13 at ¶ 6 (Aff. of Peter G. Skidmore (Mar. 11, 2016)).

But the State has disclosed none of these facts, or any other documentation that must have accompanied the State's investigation of the Alabama murders. The discovery file disclosed by the State does not contain even a single reference to Marcus Presley, LaSamuel Gamble, or Steven McKenzie. And in response to repeated discovery requests for documents relating to alternative suspects, the State produced nothing—and even represented to the Court that "[it] ha[s] never had any evidence that showed anything other than [Mr. Flowers's] guilt." Ex. 14 at 442 (Trial Tr., *State v. Flowers*, No. 2003-0071-CR (Miss. Cir. Ct. 2010) ("*Flowers VI*")); *see also id.* at 359 ("There is no more discovery."); *id.* at 383 (John Johnson testifying under oath: "I'm not familiar with another suspect"). Most recently, at the January 2016 hearing on Mr. Flowers's discovery motion, this Court asked the State whether it "possess[es] any information on any other suspects or any communication with anybody that has not been provided." Ex. 3 at 48 (Disc. Hr' Tr.). The District Attorney responded, "No, Sir." *Id.* at 49. We now know that was false, and Mr. Flowers is entitled to all documents related to the State's investigation of the Alabama suspects.

We also now know that the State interrogated at least one other suspect. Investigators from APM discovered that several days after the Tardy murders, Mississippi law enforcement considered Willie James Hemphill such a serious suspect that they launched a manhunt to find him, arrested him, interrogated him for hours while taking notes and making recordings, and tested his shoes and hands. *See* Ex. 4-F at 10, 18-23 (Ep. 10 Tr.); Ex. 15 (Arrest Report for Willie James Hemphill (July 21, 1996)). They then held him for eleven days under the pretext of

unpaid fines for other criminal charges. Ex. 4-F at 22 (Ep. 10 Tr.). Yet, in spite of this flurry of activity, the State has repeatedly claimed that Hemphill was not considered a suspect, and that even though investigators recorded their interrogation of Hemphill and took notes, there are no documents relating to their investigation of him except a one-page Miranda form indicating he was interviewed on July 21, 1996. *See id.* at 7-8; Ex. 5 (Hemphill Waiver of Rights).

In light of the evidence indicating that the State failed to disclose substantial investigations of several alternative suspects, Mr. Flowers respectfully requests the following discovery to develop his *Brady* and *Napue* claims.

Request #1. Documents and Communications Relating to Coordination with Other Law Enforcement Officers or Agencies

Given existing evidence that the State coordinated with law enforcement officers and agencies in their investigation of the Alabama suspects, Mr. Flowers respectfully requests that this Court order the State to produce: all communications between the State and any individual law enforcement officer or agency outside Winona, Mississippi, relating in any way to the investigation of the Tardy murders, and any documents relating to the same.

Request #2. Documents and Communications Relating to the Photographic Arrays

In the investigation of the Tardy murders, police used several photographic arrays that included an image of Mr. Flowers alongside images of other individuals. Such arrays were shown to witnesses, including Porky Collins and Katherine Snow, to determine whether they could identify Mr. Flowers. We now know that at least one array, shown to Porky Collins, included an alternative suspect, Marcus Presley, who was previously undisclosed to the defense.

Mr. Flowers respectfully requests that this Court order the State to produce all documents and communications relating to the arrays shown to each and every witness or potential witness, including but not limited to all documents and communications concerning: (i) how the arrays

were composed and by whom; (ii) the names, ages, height, and weight of each and every individual included in any of the arrays; and (iii) the specific source of each photograph used in the arrays.

Request #3. Hemphill Investigation Records

Mr. Flowers respectfully requests that the Court order the State to produce all documents and communications relating to the investigation of Willie James Hemphill, born September 10, 1971, from July 16, 1996 to present, including but not limited to:

- Recordings and notes from interviews of Willie James Hemphill;
- Documents relating to forensic examination of Willie James Hemphill's clothing, shoes, fingerprints, and any other source of forensic evidence;
- Documents relating to efforts to locate Willie James Hemphill after the Tardy murders;
- Documents and communications relating to the incarceration of Willie James Hemphill beginning on July 21, 1996; and
- The complete investigative file for Willie James Hemphill.

Request #4. Subpoena Testimony from Mississippi Highway Patrol Lieutenants

Mr. Flowers respectfully requests that the Court authorize him to subpoena testimony from Mississippi Highway Patrol Lieutenants Jack Matthews and Wayne Miller, who interviewed or were present for the interview of Mr. Hemphill on July 21, 1996, with respect to the investigation of Mr. Hemphill.

Request #5. Subpoena Testimony from Winona Police Officers

Mr. Flowers respectfully requests that the Court authorize him to subpoena testimony from current or former Winona Police Officers Liz Van Horn and Kenney Townsend, who arrested Mr. Hemphill on July 21, 1996, with respect to the investigation of Mr. Hemphill.

Request #6. Subpoena Testimony from Willie James Hemphill

Mr. Flowers respectfully requests that the Court authorize him to subpoena testimony from Willie James Hemphill, who was investigated in connection with the Tardy murders.

Request #7. Shelby County Murder Evidence

Mr. Flowers respectfully requests that the Court grant leave for him to subpoena the relevant Alabama authorities' physical evidence recovered from murders that LaSamuel Gamble and Marcus Presley committed on July 25, 1996 at a pawn shop in Shelby County, Alabama, under comparable circumstances and with the same type of weapon.

B. Discovery Related to Odell Hallmon

Mr. Flowers respectfully seeks an order compelling the State to disclose documents illuminating the State's quid pro quo relationship with its key witness, Odell Hallmon, including (1) Mr. Hallmon's complete criminal history and (2) a list of all cases where Mr. Hallmon testified as a witness for the State.

Mr. Hallmon was a serial offender who was incarcerated at the time of Mr. Flowers's sixth trial. Mr. Hallmon had testified for the defense in the second trial. *See* Ex. 16 at 2571-72 (Trial Tr., *State v. Flowers*, No. CR-97-372 (Miss. Cir. Ct. 1999) ("*Flowers II*")). He stated that his sister, Patricia Sullivan-Odom, lied under oath about seeing Mr. Flowers on the day of the murders in hopes of getting reward money. *Id.* But before the third trial, he both reversed his testimony and claimed for the first time that Mr. Flowers confessed to committing the Tardy murders while the two were incarcerated. *See* Ex. 17 at 1659-60 (Trial Tr., *State v. Flowers*, No. 2002-0071-CR (Miss. Cir. Ct. 2004) ("*Flowers III*")). He gave the same testimony in Mr. Flowers's sixth trial. Ex. 14 at 2416 (Trial Tr., *Flowers VI*).

We now know why. Investigative journalists for APM recently discovered that Mr. Hallmon had an undisclosed quid pro quo relationship with the District Attorney, Doug Evans. *See* Ex. 4-D at 4-6 (Ep. 6 Tr.); *see also* Ex. 4-C at 5-18 (Ep. 5 Tr.). In a recorded interview with APM in 2018, Mr. Hallmon recanted his testimony that Mr. Flowers confessed and explained that throughout the last four trials he testified falsely in exchange for repeated leniency from the District Attorney. Ex. 4-D at 4-6 (Ep. 6 Tr.). In his words, "I helped them, they helped me. That's what it all boiled down to." *Id.* at 5. Mr. Hallmon further explained: "As far as [Mr. Flowers] telling me he killed some people, hell naw, he ain't ever told me that. That was a lie. I don't know nothing about this .... It was all make-believe. Everything was all make-believe on my part." *Id.* at 6.

Specifically, "it all got started" in the third trial when the District Attorney dropped two drug charges and a robbery charge against Mr. Hallmon. *Id.* at 4. Law enforcement records unearthed by the APM reporters corroborate his story. *See In the Dark*: *Episode 5, Privilege*, APM Reports (May 22, 2018), https://www.apmreports.org/story/2018/05/22/in-the-dark-s2e5. The backroom deals continued in the lead-up to the fourth trial, when the District Attorney dropped felony charges for a drive-by shooting that had been pending during *Flowers III*. *Id.* Then the District Attorney dropped all but one of a new set of drug charges against Mr. Hallmon, and declined to indict him as a habitual offender—which would have prevented any chance of early release. *Id.* The pattern continued after Mr. Hallmon's early release in 2014, when it appeared that the sixth trial might be overturned. Later that year, after attempting to run over a police officer during another drug bust, he was charged with Aggravated Assault on a Law Enforcement Officer, only to be released on a $25,000 bond and to have his trial delayed for two

years. *Id.*[6] All of this, according to Mr. Hallmon, was in exchange for his testimony against Curtis Flowers. Ex. 4-D at 4-6 (Ep. 6 Tr.).[7]

This repeated leniency for Mr. Hallmon was never disclosed to Mr. Flowers's trial team. In response to defense counsel's repeated pre-trial requests for an assurance that the prosecution had made complete *Brady* disclosures and provided complete up-to-date criminal histories,[8] District Attorney Doug Evans insisted that "Anything that we have was furnished." Ex. 14 at 436-437 (Trial Tr. *Flowers VI*). Further, at trial, at the prompting of the District Attorney, Odell Hallmon insisted that he was not testifying in exchange for benefits. *See* Ex. 27 at 423 (Trial Tr. of *State v. Flowers*, No. 2003-0071-CR (Miss. Cir. Ct. 2007) ("*Flowers IV*")); Ex. 28 at 436-437 (Trial Tr. of *State v. Flowers*, No. 2003-0071-CR (Miss. Cir. Ct. 2008) ("*Flowers V*")); Ex. 14 at 2472-73 (Trial Tr. *Flowers VI*). It now appears that both of these claims were false.

Brady demands that a prosecutor proactively disclose any explicit or implicit deals. "[T]he law is clear . . . ": "the immunity 'deal' must be disclosed to the defense." *Barnes v. State*, 460 So. 2d 126, 131 (Miss. 1984) (citing *Giglio v. United States*, 405 U.S. 150 (1972)). "[W]here a key witness has received consideration or potential favors in exchange for testimony and lies about

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[6] That trial never happened. While out on bond, Mr. Hallmon committed and confessed to a triple-homicide and was finally sentenced to life without the possibility of parole. *Id.*

[7] The District Attorney's reliance on jailhouse "snitches" is nothing new. Two others have similarly recanted their testimony against Mr. Flowers—admitting that they were coerced by promises and threats from the State. *See* Ex. 18 (Aff. of Maurice Hawkins (Nov. 24, 2015)); Ex. 19 (Aff. of Frederick Veal (March 26, 2016)).

[8] *See, e.g.*, Ex. 20 (Request for 9.04 Disc. and for Suppl. of Disc. Furnished to Date, *Flowers VI* (Mar. 23, 2010); Ex. 21 (Notice of Renewal and Adoption of Motions from the Previous Five Trials, *Flowers VI* (Apr. 8, 2010) (renewing, *inter alia*: (a) Ex. 22 (Mot. for Order to Produce *Kyles* Information, *Flowers III* (Sept. 29, 2003)); (b) Ex. 23 (Mot. to Preclude Unreliable and Untrustworthy Snitch Testimony, *Flowers III* (Sept. 30, 2003)); (c) Ex. 24 (Mot. for Complete and Up to Date Criminal Histories of any Potential State's Witness, *Flowers IV* (Oct. 1, 2007)); (d) Ex. 25 (Mot. for Disclosure of Evidence Regarding "Snitch" [Odell Hallmon], *Flowers IV* (Oct. 1, 2007))). *See also* Ex. 26 (Report of Pretrial Discovery Conferences—Supplemental Discovery and Copies of Documentation Previously Disclosed, *Flowers IV* (May 19, 2010) (reporting pre-trial conferences of May 10 and 14, 2010, and noting that verbal disclosures were made about the witness Wanda Meeks but not Odell Hallmon)).

those favors, the trial is not fair." *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).[9] The prosecutor has a duty to proactively disclose even implicit deals. *See Tassin*, 517 F.3d at 776-777 (no "firm promise" is necessary where the witness expected to receive beneficial treatment in return for testifying consistent with their prior inculpatory statements).

The following discovery requests echo the unfulfilled pre-trial criminal history disclosures that this Court deemed "standard operating procedure." Ex. 14 at 465-466, 468 (Trial Tr. *Flowers VI*). And they are, in any event, mandatory law enforcement disclosures under Rule 22(c)(4)(ii).

Request #8. Hallmon's Complete Law Enforcement History

Mr. Flowers respectfully requests that the Court grant leave for him to request from the State the production of all records related to Odell Hallmon's (i) arrests, (ii) indictments, (iii) criminal trials. Mr. Flowers also respectfully requests lists of (iv) all arrest charges that were "charged down" at indictment, (v) all charges that were eligible for habitual offender enhancement that were not indicted as such, (vi) all indictments that were not brought to trial, (vi) all trials that were dismissed, (viii) all trials that were delayed, and (ix) all instances of early release from prison (along with all supporting documentation). Finally, Mr. Flowers requests (x) any letters or other communication in support of his early or "earned" release.

Request #9. Odell Hallmon's Witness History

Mr. Flowers respectfully requests that the Court grant leave for him to request from the State the production of a list of all cases where Mr. Hallmon testified as a witness for the State.

Request #10. Subpoena Testimony from Odell Hallmon

Mr. Flowers respectfully requests that the Court grant leave to issue a subpoena to depose Mr. Hallmon regarding his testimony in this case and related communications with the State.

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[9] The Mississippi Supreme Court and the Fifth Circuit are not alone in holding that tacit deals must be disclosed. *See, e.g., Douglas v. Workman*, 560 F.3d 1156, 1182-87 (10th Cir. 2009) (collecting cases from other circuits).

Request #11. Subpoena Testimony from Doug Evans

Mr. Flowers respectfully requests that the Court grant leave to issue a subpoena to depose Doug Evans regarding his interactions with Odell Hallmon.

C. Discovery Related to the .380 Caliber Gun Turned Over to Law Enforcement

Mr. Flowers also requests discovery relating to a .380 caliber gun, the same caliber allegedly used to commit the Tardy murders, that law enforcement retrieved in 2001 from a house near Tardy Furniture.

In 2006, Jeffrey Armstrong gave a statement to Mr. Flowers's trial attorney that he found the gun under the house where he lived with his mother, Annie. Mr. Armstrong said that after he and his mother found the gun, he put it in his shed. Shortly thereafter, he was pulled over for speeding by the Winona Police, at which point he explained that he may have found the Tardy murder weapon. He said that the police came to his mother's house and took the gun but never followed up. The officer promised to turn over the gun to the Chief of Police. The Winona Police Chief at the time was Johnny Hargrove. When Mr. Armstrong ran into Chief Hargrove at Wal-Mart and asked whether they had gotten results from the crime lab, he said that they didn't need it because they already "had the right person." *See* Ex 29 (Statement of Jeffrey Armstrong (Aug. 18, 2006)); *see also* Ex. 4-G at 1-2 (Ep. 11 Tr.).

When counsel first raised this issue in its September 9, 2015 discovery motion, the Court was skeptical. *See* Ex. 3 at 50-55 (Disc. Hr'g Tr.). The State, for its part, said that Mr. Armstrong's statement was irrelevant because it was not sworn, and asserted that Mr. Armstrong "had mental problems." *Id.* at 54-55. The Court nevertheless invited further investigation, stating that "if there is some showing that there is a weapon that for some good faith reason [Petitioner] believes that the Sheriff has in his possession, then I will certainly revisit the issue." *Id.* at 54. Mr.

Flowers took the Court's invitation, obtained an affidavit from Mr. Armstrong's mother corroborating the story, and filed a discovery motion containing more detail. *See* Ex. 30 (Aff. of Annie Armstrong (Mar. 9, 2016)); Mot. for Mandatory Disc. and for Leave to Seek Disc., *Flowers v. State*, Case No. 2003-0071-CR (Miss. Cir. Ct. Mar. 16, 2016).

We now know that Mr. Armstrong was telling the truth, based on new revelations by the investigative reporters at APM. *See In the Dark*: *Episode 11, The End*, APM Reports (July 3, 2018), https://www.apmreports.org/story/2018/07/03/in-the-dark-s2e11 [hereinafter "ITD Episode 11 Web Page"]. First, the APM reporters interviewed Mr. Armstrong, and he confirmed that he found the .380 and that it was provided to law enforcement. Ex. 4-G at 1-2 (Ep. 11 Tr.). Further, on video, Mr. Armstrong showed the reporters a direct path from Tardy Furniture to his mother's old house. *See* ITD Episode 11 Web Page. The path passed through a drainage tunnel that started about a block away from Tardy Furniture, which would have provided cover to a perpetrator fleeing the area. *Id.* But the reporters did more than that. They interviewed the police officer himself, Winona Police Officer Dan Herod, who remembered pulling over Mr. Armstrong, that Mr. Armstrong told him that he had found a gun at his mother's house, and that another officer went to the house to pick it up. Ex. 4-G at 3-5 (Ep. 11 Tr.). He said that he thought that the District Attorney's investigator, John Johnson, had picked up the gun from the police station. *Id.* He suggested that Mr. Johnson would know where it was because, "the D.A.'s office is the one that sent that gun to the crime lab." *Id.* at 4. The current Winona Police Chief, Tommy Bibbs, said the same thing. *Id.* at 5.

This is crucial evidence. First, the Armstrong house was not on the route that the State insisted that Mr. Flowers took on the day of the murders. It was in the opposite direction. *See* ITD Episode 11 Web Page. Given that a murder weapon was never recovered, the fact that a .380 gun

was found several years after the murders a few hundred yards from Tardy Furniture, and that the gun was rusty, suggesting it had been left for some time, would have been be highly probative at trial. The prosecution's contention that Curtis Flowers had used Doyle Simpson's gun to commit the murders was also central to their theory of the case. If the gun found by the Armstrong's in 2001 had been tested and it was proven either (i) to be the murder weapon, but not Doyle Simpson's gun; or (ii) Doyle Simpson's gun, but not the murder weapon, it could have dealt a fatal blow to one of the State's most important pieces of evidence. Yet law enforcement never disclosed the gun.[10] The existence of a likely murder weapon that would undermine confidence in the verdict must be disclosed under *Brady*. *See, e.g.*, *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (finding that evidence that is favorable to the accused must be disclosed regardless of whether the prosecution acted in bad faith). Where a murder weapon is found in a location inconsistent with the State's theory of the case, that fact is material. *See, e.g.*, *Guerra v. Johnson*, 90 F.3d 1075, 1076-80 (5th Cir. 1996) (reversing conviction where murder weapon's location could not be reconciled with the State's theory in light of suppressed evidence). And because this failure to disclose would add to the cumulative weight of other *Brady* violations that Mr. Flowers will seek in his petition for post-conviction review, the State has a duty under *Kyles* to disclose it now.

Mr. Flowers believes in good faith that the Winona Police Department took possession of the gun that Mr. Armstrong described and turned it over to the District Attorney's office. Accordingly, Mr. Flowers requests the following discovery.

Request #12. Documents and Communications Concerning Firearms Relating, or Potentially Relating, to the Murders

Mr. Flowers respectfully requests that the Court order the production of all documents and communications from the State and the Winona Police Department relating to (i) any

[10] The gun's existence, along with Mr. Armstrong's now-confirmed 2006 statement to the defense investigators, also supports ineffective assistance of counsel claims that Mr. Flowers plans to make.

firearm tested in connection with the investigation of the murders; (ii) all documents and communications relating to any ballistics evidence concerning the investigation of the murders; and (iii) any firearm provided to, or otherwise obtained by, the State or the Winona Police Department which was thought at any time to have a potential connection to the murders.

Request #13. Jeffrey Armstrong's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Mr. Armstrong regarding the .380 caliber gun that he discovered.

Request #14. Officer Dan Herod's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Winona Police Officer Dan Herod regarding the .380 caliber gun discovered by Mr. Armstrong.

Request #15. Chief Tommy Bibbs's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Winona Police Chief Bibbs regarding the .380 caliber gun discovered by Mr. Armstrong.

Request #16. Johnny Hargrove's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Winona Police Officer Johnny Hargrove regarding the .380 caliber gun discovered by Mr. Armstrong.

Request #17. John Johnson's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose the District Attorney's investigator John Johnson regarding the .380 caliber gun discovered by Mr. Armstrong.

D. Discovery Related to Mr. Flowers's *Batson* Claims

In his new Petition for Post-Conviction Relief, Mr. Flowers will be raising a *Batson* claim. He maintains that his right to a fair trial was violated by a jury selection process infected with racial bias.[11] The discovery Mr. Flowers seeks here is directly relevant to the question of whether Mr. Evans's stated race-neutral reasons for striking jurors were pretexts for discrimination. As explained below, Mr. Flowers has uncovered powerful new evidence that makes clear that the State's exercise of peremptory strikes was motivated by race, and the Court should grant Mr. Flowers access to the documents that may help directly prove his claim.

District Attorney Doug Evans has prosecuted Mr. Flowers in all six of his trials. In each of those trials, Mr. Evans racially discriminated during jury selection. Consider the following:

- In *Flowers I*, District Attorney Evans peremptorily struck all five African-American venire members tendered for service. The jury that convicted Mr. Flowers and sentenced him to death was all white. Mr. Flowers's conviction was overturned on appeal due to misconduct by Mr. Evans.

- In *Flowers II*, District Attorney Evans peremptorily struck all five African-American venire members tendered for service. But for the fact that the trial court disallowed one of those strikes on *Batson* grounds, the jury that convicted Mr. Flowers and sentenced him to death would again have been all white. Instead, the jury was made up of eleven whites and the lone African-American the State was prevented from removing. Mr. Flowers's conviction was again overturned on appeal due to misconduct by Mr. Evans.

[11] Over a spirited dissent, the Mississippi Supreme Court found on direct appeal in *Flowers VI* that the trial court did not err in denying Mr. Flower's *Batson* challenge. That decision is once again before the United States Supreme Court for review of whether it complies with *Batson*. Regardless, Mr. Flowers's post-conviction *Batson* claim is wholly distinct from his claim on direct appeal. The direct appeal *Batson* claim is based entirely on the trial record. The post-conviction *Batson* claim, by contrast, will be based on a mountain of newly discovered evidence—including evidence sought in this motion.

- In *Flowers III*, District Attorney Evans exercised all fifteen available peremptory strikes (twelve strikes plus three alternate strikes) against African-American venire members. Although two African-Americans sat on the jury, they did so only because the State ran out of peremptory strikes. On direct appeal, the Mississippi Supreme Court reversed Mr. Flowers's conviction on the basis of two clear *Batson* violations and three more highly suspicious strikes. *Flowers v. State*, 947 So. 2d 910, 936 (Miss. 2007). The Mississippi Supreme Court deemed Mr. Evans's conduct during jury selection "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Id.* at 935.

- In *Flowers IV*, District Attorney Evans exercised all eleven available peremptory strikes against African-American venire members. Although five African-Americans sat on the jury, again, that was only because the State ran out of peremptory strikes. *Flowers IV* resulted in a mistrial.

- In *Flowers V*, District Attorney Evans used four of the five peremptory strikes he exercised to strike African-American venire members. Three African-Americans served on the jury. *Flowers V* resulted in a mistrial.

- In *Flowers VI*, District Attorney Evans accepted the first African-American venire person tendered for service, and then peremptorily struck the remaining five African-American panel members. Put another way, Mr. Evans struck 83% of the African-American jurors tendered. The jury that convicted Mr. Flowers was made up of eleven whites and one African-American out of an original venire that was 42% African-American.

Thus, across the six prosecutions of Curtis Flowers, the State accepted a grand total of four African-Americans for jury service. Every other African-American who made it onto a *Flowers* jury did so either because the State ran out of peremptory strikes after using 100% of them to strike African-Americans, or because the trial court reversed a strike after finding it was racially motivated.

New evidence confirms the racial motivation behind the State's use of peremptory strikes at Mr. Flowers's trial. Two newly conducted statistical analyses of Mr. Evans's exercise of peremptory strikes since he assumed the role of District Attorney for Mississippi's Fifth District

in 1992 reveal that he is far more likely to strike a black qualified venire member than a white qualified venire member.

The first statistical analysis was organized by Mr. Flowers's post-conviction team. That analysis revealed that, across every capital case that Mr. Evans tried for which jury strike data were available, Mr. Evans is eight times more likely to strike qualified venire members who are African-American than qualified white venire members. *See* Pet. for Post-Conviction Relief at 90, 98, *Flowers v. State*, Case No. 2003-CR-0071-CR (Miss. Cir. Ct. Mar. 17, 2016) [hereinafter "2016 PCR Pet."]. There is less than a one in one thousand chance that a disparity of this magnitude would occur if Mr. Evans's jury selection decisions were race neutral. *Id.* at 98. Mr. Evans's discriminatory strikes were even more aggressive in the *Flowers* trials. In those cases, Mr. Evans struck qualified African-American venire members at a rate more than 20 times the rate with which he struck white qualified venire members. *Id.* This pattern across the *Flowers* trials is consistent with the pattern evidenced in Mr. Flowers's most recent trial where Mr. Evans struck black qualified venire members at 17.9 times the rate of qualified white venire members. *Id.*

The second statistical analysis was conducted recently by investigative reporters with APM, independent of the efforts of Mr. Flowers's post-conviction team. APM analyzed not just Mr. Evans's capital trials, but all trials prosecuted by Mr. Evans or his office, and found that during a 26-year period in which Mr. Evans was District Attorney, from 1992 to 2017, prosecutors in Mississippi's Fifth District were almost 4.5 times more likely to strike black qualified venire members than white qualified venire members. Will Craft, *Mississippi D.A. has long history of striking many blacks from juries*, APM Reports (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-

juries/.[12] Further, after reviewing complete *voir dire* transcripts for 89 trials and tracking juror responses using more than 60 variables, APM found that race was one of the most powerful indicators in predicting whether a juror would be struck. *Id.* The other factors "did not come close to explaining away" "the vast racial disparity in the prosecution's jury strikes." *Id.* "It persisted regardless of how the jurors answered." *Id.* For example, prosecutors struck 96% of black potential jurors accused of a crime, but only 60% of white potential jurors accused of a crime. *Id.* APM also found that "a black juror's odds of being struck were 6½ times greater than the odds of an otherwise similar white juror's despite answering questions during jury selection the same way." *Id.*

This new evidence supplies powerful confirmation that race was the reason only one African-American sat on the jury that convicted Mr. Flowers and sentenced him to death in his most recent trial. Such massive disparities would not exist without intent to keep African-Americans off Mr. Flowers's jury.[13] While Mr. Flowers submits that this would be sufficient to warrant relief on his *Batson* claim, the following discovery likely contains additional relevant information.

Request #18. Jury-Related Documents from Mr. Flowers's Sixth Trial

Mr. Flowers respectfully seeks an order compelling the State to disclose the prosecution's jury-related documents from Mr. Flowers's sixth trial. This includes, but is not limited to, the prosecution's jury "strike sheet(s)," notes, communications, and other documents pertaining to or referencing jury selection and the jury. In light of the new statistical evidence and Supreme Court

[12] The full methodology for the study can be found online. *See* Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, APM Reports, https://www.apmreports.org/files/peremptory_strike_methodology.pdf (last visited Nov. 11, 2018). The raw data sets are also available online. *See APM Reports Jury Data*, GitHub, https://github.com/APM-Reports/jury-data (last visited Nov. 11, 2018).

[13] In addition to this powerful statistical evidence, ample further evidence of racial discrimination is apparent from the record. For example, Mr. Evans engaged in disparate questioning of potential African-American and potential white jurors during *voir dire* in *Flowers VI*. *See* 2016 PCR Pet. at 102-103.

case law clarifying the importance of these documents, the Court should order the State to produce them, notwithstanding the State's work-product objections.

a. New Evidence and Supreme Court Precedent Warrant Reconsideration of Whether Jury-Related Documents Must Be Produced

This Court previously reviewed some of the prosecution's jury-related documents *in camera* and determined that they need not be produced. But it did so without the benefit of powerful new statistical evidence that provides essential context for assessing the documents; namely, that District Attorney Doug Evans has a long-standing practice of purging African Americans from juries. There is no reason to believe that Mr. Evans changed course in Mr. Flowers's case. To the contrary, the Mississippi Supreme Court found that Mr. Evans struck jurors on the basis of race in Mr. Flowers's earlier trials, and in *Flowers VI*, he struck 83% of the African-American jurors tendered, resulting in only one African-American juror serving on the jury. In light of these strong indicators of racial bias, the Court should order the State to produce documentation of its jury-selection process, which would provide direct evidence of the prosecution's intent in Mr. Flowers's case.

These documents are particularly important in light of the U.S. Supreme Court's recent decision in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), which was decided after this Court's initial ruling on Mr. Flowers's *Batson*-related discovery requests. *Foster* established that a prosecutor's jury-related documents can be vital to proving *Batson* violations. During his post-conviction proceedings, Mr. Foster gained access to the prosecution's jury selection file, which revealed a "focus on race" that "plainly demonstrate[d] a concerted effort to keep black prospective jurors off the jury." *Foster*, 136 S. Ct. at 1743, 1755. After considering the evidence contained in the

file,[14] along with the prosecution's "shifting explanations" for striking black jurors and the actual circumstances surrounding the strikes, the Court held that the State had violated *Batson* and ruled in Mr. Foster's favor. *Id.* at 1754-55.

Prior to obtaining access to the prosecution's jury selection documents, Mr. Foster had repeatedly challenged his conviction on *Batson* grounds, and lost every time. *Id.* at 1742-43. It was not until he gained access to the prosecutor's jury selection file that he was able to marshal sufficient and incontrovertible proof that the prosecution had struck jurors on the basis of race. Indeed, before he could point to those documents, courts had found that the prosecution's explanations for each of their jury strikes were "neutral and legitimate," and sufficient to overcome the *prima facie* case of discrimination that Mr. Foster had made out. *See, e.g.*, *Foster v. State*, 258 Ga. 736, 739 (1988). This, in a case where, after the documents came to light, Justice Kagan remarked at oral argument: "Isn't this as clear a *Batson* violation as a court is ever going to see?" *Foster v. Chatman*, No. 14-8349, 2015 WL 6694912, at *39 (Nov. 2, 2015).

Foster thus illuminates the importance of jury-related documents for establishing a *Batson* violation. This is precisely the type of development in the law that warrants reconsideration of prior decisions, especially given that Mr. Flowers has re-started the post-conviction process after the Mississippi Supreme Court's new mandate on direct appeal. *Cf. Hill*, 121 F.3d at 177 (vacating lower court judgment due to a mid-course change in Mississippi law and remanding for new proceedings consistent with the law); *Millipore*, 115 F.3d at 34 (remanding decision for new submissions in light of an "intervening clarification of the law"). While Mr. Flowers has unearthed strong evidence of *Batson* violations even without jury-related

[14] For instance, a draft affidavit stated that if prosecutors had to "pick one of the black jurors, [this one] might be okay," notes identified three black prospective jurors as "B#l," "B#2," and "B#3," the jury venire list highlighted each black juror in green with a legend noting that highlighting "represents Blacks," and the list of prospective jurors remaining after *voir dire* included a letter "N" next to every black juror, indicating that the State had a strike for that juror. *Id.* at 1744.

documents, those materials may contain information that definitively proves Mr. Flowers's claim.

b. The Work Product Doctrine Does Not Preclude Production of the Jury-Related Documents

The documents Mr. Flowers seeks should not be shielded from disclosure under the work product doctrine because any mental impressions they contain are the reason for their discovery not for shielding them; and in any case, no harm would flow from requiring the State to disclose the documents. But even if this Court were to adhere to its prior finding that the jury selection documents are work product, the Court should still order its disclosure because Mr. Flowers has demonstrated that he has a compelling need for the information and that he cannot access the information by any other means.

i. The prosecution's jury-related documents are not work product

The work-product doctrine "does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (internal citation omitted). "Its purpose is more narrow, its reach more modest." *Id.* The work-product doctrine should only be applied as necessary to "encourage effective legal representation within the framework of the adversary system," *id.*, and to facilitate both parties' "search for the truth," *Pac. Gas & Elec. Co. v. United States*, 69 Fed. Cl. 784, 808 (2006) (internal citation omitted).

This goal of promoting effective representation as a means to identify the truth is hampered when parties can use the work product doctrine to shield mental impressions that disclose or embody a constitutional violation. Allowing the State to hide its constitutional violations by invoking the work product doctrine hinders this objective, particularly because the goal of a prosecutor in a prosecution is not to "win a case," but ensure that "justice shall be

done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* ABA Standards for Criminal Justice 3-1.2(b) (4th ed. 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."). The prosecution violated Mr. Flowers's constitutional rights by striking African-American prospective jurors during *voir dire*, putting the mental impressions of the prosecution directly at issue in this case. Under these circumstances, "blanket application of the work product rule would be inappropriate." *Lisle v. McDaniel*, No. 2:03-CV-1005-JCM-LRL, 2006 WL 3253488, at *4 (D. Nev. Nov. 8, 2006).

The State previously relied heavily on *Thorson v. State*, 721 So. 2d 590 (Miss. 1998) to argue that the documents Mr. Flowers seeks were work product. That reliance is misplaced, for several reasons. First, *Thorson* does not address a defendant's need for prosecution notes in the post-conviction context—a material distinction, given that the work product doctrine is focused on the adversarial trial process. Second, in reaching the conclusion that prosecution notes are protectable work product, the *Thorson* Court relied on the Georgia Supreme Court's decision on direct appeal in *Foster*. *Id.* at 596 n.7. The Supreme Court's recent decision reversing the lower courts' denial of relief in *Foster* undermines *Thorson*'s reasoning that the documents Mr. Flowers seeks are work product. Specifically, the evidence in *Foster* and the Supreme Court's recent decision in that case destroys the *Thorson* Court's public policy rationale for characterizing this sort of documents as work product. We now know that behind the prosecutor's claim of "work product" in *Foster* was simply a desire to shield his malfeasance from public scrutiny. Indeed, the "mental impression" of a prosecutor exercising a peremptory strike is the whole point of a *Batson* challenge: if his "mental" reason for striking a person was based on race, then it was a constitutional violation. In view of the Supreme Court's *Foster*

decision, this Court should no longer credit a public policy rationale to support an argument that prosecution notes are work product.

That conclusion is underscored by the fact that no damage would flow to the State from the disclosure of these documents. Mr. Flowers's sixth trial ended nearly eight years ago; there is therefore no risk of divulging trial strategy through disclosure of the jury selection notes. *See Harris v. United States*, No. 97CIV.1904(CSH), 1998 WL 26187, at *1 (S.D.N.Y. Jan. 26, 1998) (turning over prosecution documents will not harm the government because if the petitioner failed to carry his burden of proof, he would not receive a remedy, but if documents "demonstrate prosecutorial wrongdoing of sufficient severity to require a new trial for [the petitioner], then the government has no one to thank but itself for whatever difficulties the disclosed documents may cause during a retrial that justice itself demands"); *cf. Thorson*, 721 So. 2d at 596 (addressing disclosure of the prosecution's jury notes only at a trial-stage *Batson* hearing). Rather, Mr. Flowers seeks the documents to assess the propriety of the State's prior litigation conduct. There is strong evidence of the impropriety of that conduct, as discussed above.

ii. Even if the documents at issue were work product, the Court still should order disclosure because Mr. Flowers has demonstrated a compelling need for the documents and has no other means of accessing them

The work product doctrine does not create an absolute bar to discovery, and "does not shield all documents from discovery." *Flechas v. Pitts*, 138 So. 3d 907, 911-912 (Miss. 2014).[15] Instead, a party may obtain discovery of an attorney's work product so long as the moving party

[15] Though *Flechas* involved discovery under the Mississippi Rules of Civil Procedure, there is no reason to believe that a post-conviction petitioner has less right to discovery of work product than normal civil litigants or that the principles discussed in that case are inapplicable here. To the contrary, this Court has emphasized the need for heightened protections in capital cases like this one. *See Chamberlin v. State*, 989 So. 2d 320, 330 (Miss. 2008) ("The thoroughness and intensity of review are heightened in cases in which the death penalty has been imposed.").

can show that "it has a substantial need for the information and it would be an undue hardship to obtain the information by other means." *Id.* at 912. The doctrine "places responsibility on the trial court when making such determinations to protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representatives of a party concerning the litigation." *Id.* (quoting *Hewes v. Langston*, 853 So. 2d 1237, 1266 (Miss. 2003)).

In general, while a lawyer's opinion work product should rarely be disclosed, a party may discover work product that includes an attorney's mental impressions when the lawyer's mental impressions are at issue in the case and there is a compelling need for disclosure. *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) ("We agree with the several courts and commentators that have concluded that opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling.") (emphasis in original); *In re Sealed Case*, 676 F.2d 793, 809-810 (D.C. Cir. 1982) ("[T]o the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification."); *see also S.E.C. v. Brady*, 238 F.R.D. 429, 443 (N.D. Tex. 2006) ("[I]f the materials sought are opinion work product then a court may compel discovery only if the party seeking the materials demonstrates a compelling need for the information."); *Harris*, 1998 WL 26187, at *2 ("Where the activities of counsel in the underlying proceeding form the very basis of a present claim for relief, courts routinely 'find the need for production of counsel's work product compelling.'" (quoting *Panter v. Marshal Field & Co.*, 80 F.R.D. 718, 726 (N.D. Ill. 1978))). Here, Mr. Flowers has made the "stronger showing" required to obtain discovery of the "mental impressions" that led Mr. Evans to strike African-American jurors from his jury. *Cf.*

Hewes, 853 So. 2d at 1247 (documents that "reveal the attorney's mental impressions . . . may be obtained through discovery only in rare situations, and upon a far stronger showing than for other work product documents") (citing *Upjohn Co. v. United States*, 449 U.S. 383, 400-402 (1981)); *Flechas*, 138 So. 3d at 912 (in order to obtain "discovery of an attorney's work product, the moving party has the burden to show it has a substantial need for the information and it would be an undue hardship to obtain the information by other means" (citing *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1247 (Miss. 2005)).

And there is no question that Mr. Flowers has a compelling need for the discovery. The information he seeks may support a claim that would require reversal of his convictions and death sentence. The stakes could not be higher. This is not a fishing expedition; as described above, Mr. Flowers has marshaled substantial evidence that District Attorney Doug Evans is a habitual *Batson* violator, and that he exercised his peremptory strikes on the basis of race during Mr. Flowers's sixth trial, as well as more generally in capital and non-capital cases during his tenure as District Attorney. Just as they did in *Foster*, the jury-related documents may help directly prove Mr. Flowers's *Batson* claim.

And Mr. Flowers has no other means of accessing this information.[16] The issue here is this prosecutor's reasons for striking black venire members; the person with the information is the prosecutor, Doug Evans—and, like the prosecutor in *Foster*, he has a clear motive to hide the truth.

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[16] The Court's prior *in camera* review of the State's jury selection documents was insufficient to protect Mr. Flowers's rights. The review was conducted without the benefit of briefing because the evidence was not made available to counsel; the order issued provided no explanation for its conclusions, nor any explanation of why the Court believed the materials would not support Mr. Flowers's *Batson* petition. Further, this review occurred prior to the Supreme Court's opinion in *Foster*, and without the extensive record of Mr. Evans's *Batson* violations, highlighted above.

Request #19. Jury-related Documents from All Capital Cases and Non-Capital Murder Cases Prosecuted by District Attorney Evans and/or the Fifth Judicial District Attorney's Office

Mr. Flowers respectfully seeks an order compelling the State to disclose the prosecution's jury-related documents from all capital cases and non-capital murder cases prosecuted by District Attorney Evans, including but not limited to the prosecution's jury "strike sheet(s)," notes, and other documents pertaining to or referencing jury selection. These documents would provide additional context for Mr. Evans's long-standing habit of striking African-American jurors on the basis of race. Like the statistical evidence of this practice, the documents would substantially bolster Mr. Flowers's claim for relief. *See Miller-El v. Dretke*, 545 U.S. 231, 263 (2005); *Currie v. McDowell*, 825 F.3d 603, 610-611 (9th Cir. 2016) ("[T]he Supreme Court used the fact that prosecutors belonged to a district attorney's office with a history of racial bias to bolster its finding of a prima facie case. In this instance, it is not only the same office, but the same prosecutor, who brings a history of *Batson* violations with him."). As explained above, these documents are not protected by the work-product doctrine. And even if they were, the Court should still order their production.

Request #20. Capital-Eligible Cases Tried by District Attorney Evans and/or the Fifth Judicial District Attorney's Office

Mr. Flowers also respectfully requests that the Court grant leave for him to request from the State the production of a list of all capital-eligible cases that District Attorney Evans and/or the Fifth Judicial District Attorney's Office tried from 1992 to present, including details on whether they were tried capitally or non-capitally.[17] This evidence would help further develop Mr. Flowers's claim that Mr. Evans and his office have a pattern of racially discriminatory use of

[17] This request for demographic information for the venires in all capital cases is related to, but separate from Request #2 for jury-related documents in all capital and non-capital murder cases prosecuted by District Attorney Evans and/or the Fifth Judicial District Attorney's Office.

peremptory strikes. As discussed, a history of *Batson* violations is relevant in assessing whether discrimination occurred. *See Miller-El*, 545 U.S. at 263; *Currie*, 825 F.3d at 610-611.

Request #21. Capital Cases Tried by District Attorney Evans and/or the Fifth Judicial District Attorney's Office

Mr. Flowers respectfully requests that the Court grant leave to request the production of a list of all capital cases that District Attorney Evans and/or the Fifth Judicial District Attorney's Office have tried from 1992 to present, and for each trial, the following information: (a) name and race (and gender, if available) of all members of the venire; (b) list of jurors excluded for cause; (c) name of jurors peremptorily struck by the State; (d) name of jurors peremptorily struck by defense; (e) name and race (and gender, if available) of all tendered and struck jurors; and (f) name and race (and gender, if available) of seated jurors. Like the previous two requests, this evidence would further establish the District Attorney's history of race-based peremptory strikes.

E. Discovery Related To Other Fabricated Witness Statements

New evidence uncovered by reporters at APM indicates that the State coerced several witnesses into giving false testimony against Mr. Flowers. To give just one example, the State relied at trial on the testimony of Ed McChristian, who claimed to have seen Mr. Flowers on the morning of the murder along the route that the State theorized he took to commit the murders. Ex. 14 at 2301-03 (Trial Tr. *Flowers VI*). Mr. McChristian recently told APM reporters, however, that he was not actually sure that he saw Mr. Flowers, that investigator John Johnson had supplied him with the details of his testimony, and that he felt pressured to cooperate with the State. *See, e.g.*, Ex. 4-B at 12-14 (*In the Dark* Episode 2 Tr). Several other witnesses gave similar accounts or stated that they would not testify if Mr. Flowers had another trial. *Id.* at 16-19.

In addition, new evidence shows that investigator John Johnson misrepresented certain witnesses' statements in the investigative notes that were disclosed to the defense, *see, e.g.*, Ex. 4-E at 14-19 (*In the Dark* Episode 9 Tr.), and that John Johnson cited in his trial testimony, *see, e.g.*, Ex. 14 at 2994-96 (Trial Tr. *Flowers VI*). John Johnson's notes stated, for example, that a man named Jerry Ghoston had told Mr. Johnson that about four or five months prior to the Tardy murders, Mr. Flowers told Mr. Ghoston that he had a pistol. Ex. 4-E at 15 (Ep. 9 Tr.). Mr. Ghoston recently clarified, however, that all he told Mr. Johnson was that Mr. Flowers had stopped by his house on the day of the murders to ask for a cigarette. *Id.* at 14-15. He said nothing about a gun. *Id.* at 15-16.

These discovery requests are relevant to Mr. Flowers's *Brady* and *Napue* claims because the underlying information will likely show that the State both withheld critical witness impeachment evidence and that the State fabricated and coerced witness statements. The evidence could also irreparably undermine the State's theory of the case, given how persistently the State relied on these "timeline" route witnesses at trial.

Request #22. Subpoena Testimony from Witnesses Whose Statements Were Fabricated by the State.

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose witnesses who have indicated that their statements to law enforcement or testimony at trial were false, including: Eloise Daniels, Antonio Earl Campbell, Mary Jeanette Fleming, Jerry Ghoston, Roy Harris, Nat Latham, Vera Latham, Ed McChristian, James "Bojack" Edward Kennedy, Danny Joe Lott, and Mary Sue Moore, Carol Lanney Moore.

Request #23. Subpoena Testimony from Witnesses Who no Longer Stand by Their Statements.

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose witnesses who have indicated that they would no longer testify as to the veracity of their statements or testimony, including Clemmie Flemming and Catherine Snow.

F. Discovery Related to Patricia Sullivan-Odom

New evidence uncovered since Mr. Flowers's trial shows that a key prosecution witness, Patricia Sullivan-Odom—the only witness whose testimony purported to link Mr. Flowers to the crime scene—was under a 13-count federal tax fraud indictment at the time she gave her testimony. Members of the prosecution team knew or should have known of Ms. Sullivan-Odom's indictment prior to Mr. Flowers's trial. The State never disclosed this impeachment evidence. Defense counsel did not learn of it until several months after trial, despite explicitly renewing its request for updated criminal histories and explicitly requesting all *Brady* materials that could be relevant to witness impeachment.[18] If the State somehow remained unaware of the indictment, the information was readily available through a routine National Crime Information Center check—the very same check that the prosecution did before Mr. Flowers's other trials, upon the very same request of Mr. Flowers.[19] As this Court observed during the sixth trial, these requests were, "just standard operating procedure for any, any court to follow." Ex. 14 at 465-466, 468 (Trial Tr. *Flowers VI*). The reason, of course, is that impeachment evidence like this is so obviously subject to disclosure under *Brady*.

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[18] *See* Ex. 20 at 2-3 (requesting all *Brady* materials); Ex. 21 (renewing, *inter alia*, Ex. 22 at 1 (seeking "disclosure of any and all information which is material under *Kyles v. Whitley*, 514 U.S. 419 (1995)") and Ex. 24 at 1 (seeking "complete and up to date criminal histories for any person the State identifies as a potential witness it may call to testify at trial.")).

[19] *See* Ex. 31 at 9 (NCIC Report (Sept. 17, 2008)). *See* Ex. 32 at ¶¶ 14-17 (Aff. of Ray Charles Carter (Mar. 15, 2016)). *See also Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) ("[T]he prosecution is deemed to have knowledge of information readily available to it and the failure to provide that information when requested is a violation of the *Brady* rule.").

Furthermore, the circumstances of Ms. Sullivan-Odom's sentencing strongly suggest an undisclosed deal between the District Attorney's office and Ms. Sullivan-Odom's attorney. On April 15, 2010, two months before Mr. Flowers's sixth trial began, Mark K. Horan entered his appearance as Sullivan-Odom's defense counsel in connection with her federal charges.[20] *See* Ex. 34 (*Sullivan* Entry of Appearance). As a former member of District Attorney Evans's office, Mr. Horan prosecuted Mr. Flowers in his first and second trials, and even examined Patricia Sullivan-Odom as a witness during *Flowers I*. *See* Ex. 35 at 563-574, 586-588 (Trial Tr. of *State v. Flowers*, Cause No. CR97-369 (Miss. Cir. Ct. Oct. 1997) ("*Flowers I*")). Thus, he was intimately familiar both with Mr. Flowers's case and with the crucial importance of Ms. Sullivan-Odom's testimony to the State's case against Mr. Flowers. At Ms. Sullivan-Odom's sentencing hearing in January 2011, he described himself as part of the *Flowers* prosecution team and highlighted Ms. Sullivan-Odom's testimony in Mr. Flowers's sixth trial as a reason why she should receive a reduced sentence. *See* Ex. 36 at 55-56 (Hr'g Tr., *United States v. Patricia Sullivan*, No. 3:10-cr-00017 (S.D. Miss. Jan. 5, 2011), ECF No. 76-1). Patricia Sullivan-Odom's plea for a lesser sentence was further supported by a personal letter from Doug Evans. [21]

Ms. Sullivan-Odom's fraud indictment—and any explicit or implicit deals—are *Brady* material that would have seriously undermined her credibility and reliability. *See, e.g., United*

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[20] Mr. Horan began representing Ms. Sullivan-Odom under questionable circumstances. Ms. Sullivan-Odom was found to be indigent at her March 5, 2010 arraignment, and the Federal Public Defender was appointed to represent her. *See* Ex. 33 (Order Appointing Counsel, *United States v. Sullivan*, No. 3:10-cr-00017, (S.D. Miss. Mar. 5, 2010), ECF No. 7). Yet she somehow acquired the means to retain private counsel immediately thereafter, *see* Ex. 34 (Entry of Appearance Upon Substitution, *United States v. Sullivan*, No. 3:10-cr-00017, (S.D. Miss. Apr. 5, 2010), ECF No. 13) and just happened to retain a former *Flowers* prosecutor and colleague of Mr. Evans.

[21] District Attorney Evans's letter was filed under seal with Ms. Sullivan-Odom's presentence investigation report. Mr. Flowers moved the federal court for production of the letters submitted on Ms. Sullivan-Odom's behalf in connection with her sentencing. Although the Government did not oppose the request, the district court entered an order denying it on April 11, 2012. *See* Ex. 37 (Op. and Order, *United States v. Patricia Sullivan*, No. 3:10-cr-00017 (S.D. Miss. April 11, 2012)). To this day, Mr. Evans has not produced the letter to Mr. Flowers or his counsel.

States v. Staples, 410 F.3d 484, 489 (8th Cir. 2005) (noting that, for a potential witness under indictment in a fraud case, "the conduct underlying that indictment almost certainly would have been suitable material for impeachment," and that such impeachment "would have diminished greatly the value of his testimony"); *cf. Johnson v. State*, 525 So. 2d 809, 812 (Miss. 1988) (discussing the "'rule of thumb' that convictions which do not relate to credibility, i.e., deceit, fraud, cheating, generally have little probative value for impeachment purposes") (citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)).

District Attorney Evans has stated that he had no knowledge of Ms. Sullivan-Odom's indictment at the time of Mr. Flowers's trial, and that he only learned about the indictment "sometime after the June 18, 2010 conviction of Curtis Flowers." Ex. 38 (Aff. of Doug Evans (May 17, 2012) (Ex A to Resp. to Mot. for Remand and Leave to File Suppl. Mot for New Trial, *Flowers v. State*, Case No. 2010-DP-01348-SCT (Miss. Cir. Ct. May 25, 2012)). But that does not end the inquiry, since Mr. Evans's duty to disclose is not limited "by his knowledge," *Gibbs v. Johnson*, 154 F.3d 253, 256 (5th Cir. 1998), but rather includes all information "known ***or available to*** the prosecutor," *United States v. Koetting*, No. 95-10101, 1995 WL 786436, *3 (5th Cir. Dec. 8, 1995) (emphasis added) (quoting *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980)). It was Mr. Evans who put Ms. Sullivan-Odom on the stand; he had a duty to disclose all impeachment evidence before he did so.[22]

Mr. Flowers therefore respectfully requests the following discovery that is likely to illuminate the State's suppression of Ms. Sullivan-Odom's indictments and the State's explicit or implicit promises of leniency in exchange for her testimony against Mr. Flowers.

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[22] Regardless, even in the unlikely event Mr. Evans himself was unaware of the indictment, he never refutes that other members of the prosecution and investigation teams may have learned of it.

Request #24. Subpoena to Mark K. Horan for Pertinent Communications

Mr. Flowers respectfully requests that the Court grant him leave to issue a subpoena to Mark K. Horan for all communications, including emails, between Mr. Horan and/or his office and the Office of the District Attorney for Mississippi's Fifth Circuit Court District, including but not limited to Doug Evans, regarding Patricia Sullivan-Odom's federal tax fraud indictment and trial and/or Mr. Flowers's sixth trial. Such communications include any letter(s) written by Mr. Evans, or anyone in his office, which relate in any way to Ms. Sullivan-Odom's case, including but not limited to the letter filed under seal in Ms. Sullivan-Odom's case, and/or all other communications, either written or oral—or, if not memorialized, identifying information for the individual(s) who have information about such communication(s).

At the January 29, 2016 hearing, this Court expressed concern that these discovery requests could violate attorney-client privilege. Ex. 3 at 27-32 (Disc. Hr'g Tr.). Mr. Flowers has not, however, requested any communications between Mr. Horan and his client. The requests pertain only to communications between Mr. Horan and the District Attorney or his office. The District Attorney is a third party who did not have an attorney-client relationship with Mr. Horan or Ms. Sullivan-Odom. *See* M.R.E. Rule 502 (2018). And to the extent that Mr. Horan relayed privileged information to Mr. Evans at the behest of Ms. Sullivan-Odom, the privilege was waived. *See Hayden v. State*, 972 So. 2d 525, 533 (Miss. 2007). Furthermore, the requests are narrowly tailored to communications about only one client: Ms. Sullivan-Odom.[23] Communications related to any of Mr. Horan's other clients is not requested and should not be disclosed.

[23] Indeed, even the fact that an attorney represents a particular client is not privileged information. *See Nester v. Jernigan*, 908 So. 2d 145, 149 (Miss. 2005) (client identity is protected only if revealing their identity would be tantamount to disclosing the underlying privileged communication).

Request #25. Subpoena to the District Attorney's Office for Pertinent Communications

Mr. Flowers likewise respectfully requests that the Court grant him leave to issue a subpoena to the Office of the District Attorney for Mississippi's Fifth Circuit Court District for all communications, including emails, between Mr. Horan and/or his office and the Office of the District Attorney for Mississippi's Fifth Circuit Court District, including but not limited to Mr. Evans, regarding Patricia Sullivan-Odom's federal tax fraud indictment and trial and/or Mr. Flowers's sixth trial. Mr. Flowers also respectfully requests that the Court order the State to produce a copy of any letter(s) written by Mr. Evans or anyone in his office which relate in any way to Ms. Sullivan-Odom's case, including but not limited to the letter filed under seal in Ms. Sullivan-Odom's case, and/or all other communications, either written or oral—or, if not memorialized, identifying information for the individual(s) who have information about such communication(s).

Request #26. Mark K. Horan's Phone Records

Mr. Flowers respectfully requests that the Court grant him leave to issue subpoenas to Mark K. Horan's landline and cellular telephone service providers for certain of Mr. Horan's telephone records between November 1, 2009 and April 1, 2011. This request includes any communications between Mr. Horan and the Office of the District Attorney for Mississippi's Fifth Circuit Court District, including but not limited to Doug Evans, before, during, or after Ms. Sullivan-Odom's indictment and sentencing, suggesting the prosecution team knew or should have known of Ms. Sullivan-Odom's indictment prior to Mr. Flowers's trial, and/or impermissibly suppressed favorable impeachment evidence.

Request #27. Mark K. Horan Deposition

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Mark K. Horan. Such a deposition would, *inter alia*, inquire into Mr. Horan's communications with the Office of the District Attorney for Mississippi's Fifth Circuit Court District regarding Patricia Sullivan-Odom's federal tax fraud indictment and trial and/or Mr. Flowers's sixth trial. Mr. Horan's deposition will be narrowly tailored to assisting the determination of whether the prosecution team knew or should have known of and/or suppressed favorable impeachment evidence.

Request #28. Patricia Sullivan-Odom Deposition

Mr. Flowers respectfully requests that the Court grant him leave to issue a subpoena to depose Patricia Sullivan-Odom to inquire into any benefits offered to Ms. Sullivan-Odom in return for her testimony against Mr. Flowers, and any communications between Ms. Sullivan-Odom and the Office of the District Attorney for Mississippi's Fifth Circuit Court District, including but not limited to Mr. Evans, regarding her federal tax fraud indictment. Mr. Flowers also seeks to inquire into Ms. Sullivan-Odom's knowledge of any communications between Mr. Horan and the Office of the District Attorney for Mississippi's Fifth Circuit Court District.

Request #29. Doug Evans Deposition

Mr. Flowers respectfully requests that the Court grant him leave to issue a subpoena to depose Mr. Evans to inquire into his knowledge of Ms. Sullivan-Odom's indictment and any benefits offered to Ms. Sullivan-Odom by the Office of the District Attorney for Mississippi's Fifth Circuit Court District in return for her testimony against Mr. Flowers. Mr. Evans has

provided the Court with an affidavit and explained himself in the prior hearing, but Mr. Flowers should be granted the opportunity to question him under oath regarding his assertions.

G. Discovery Related to Law Enforcement Investigations

Mr. Flowers also seeks the production of other documents and communications relating to law enforcement investigations.

The State offered virtually no physical evidence tying Mr. Flowers to the Tardy murders. To date, the State has produced no tangible items bearing DNA evidence recovered from the crime scene, or documentation thereof. Such evidence would be directly relevant to *Brady* claims and may also constitute new evidence of actual innocence.

Further, numerous witnesses, including Chief Hargrove, testified that door-to-door canvassing and neighborhood searches were conducted by law enforcement in the aftermath of the Tardy murders. *See, e.g.*, Ex. 14 at 1848, 1868-69 (Trial Tr. *Flowers VI*). The State has failed to produce all documents and communications relating to canvassing and searches. Mr. Flowers is entitled to production of such documents and communications because they are likely to provide exculpatory information.

Finally, Mississippi law enforcement agencies provided few, if any, documents in response to requests for relevant materials. In an incident of this size and scope, it seems highly unlikely that any of these agencies would have no responsive records at all. The Court should therefore allow Mr. Flowers to depose custodians at these agencies regarding potentially relevant documents.

Request #30. DNA Evidence

Mr. Flowers respectfully requests that the Court grant leave for him to request from the State the production of tangible items bearing DNA evidence recovered from the crime scene and any documentation thereof.

Request #31. Documents and Communications Relating to Canvassing and Search Efforts in the Aftermath of the Murders

Mr. Flowers respectfully requests that the Court order the production of all documents and communications concerning any canvassing and searches conducted in relation to the murders, including but not limited to any physical searches of persons or property and/or any interviews of persons, carried out by law enforcement after the murders.

Request #32. Depositions of Law Enforcement Agency Custodians

As numerous state agencies have represented that they have no documents responsive to Mr. Flowers's discovery requests, Mr. Flowers respectfully requests that he be entitled to depose the records custodians of those agencies for the limited purpose of ascertaining each agency's document collection, creation, and retention policies and to verify that no responsive documents are available. Mr. Flowers seeks to depose the records custodians of the following agencies: (i) The District Attorney's Office, Fifth Circuit Court District; (ii) Montgomery County Sheriff; (iii) Winona Police Department; (iv) Mississippi Highway Patrol; (v) Mississippi Medical Examiner; and (vi) Mississippi Bureau of Investigations.

H. Discovery Related to Mr. Flowers's Good Behavior and Lack of Dangerousness

During the sentencing phase of a criminal trial, a defendant is permitted to present the jury with mitigating evidence, i.e. evidence of his "character, record, or circumstances of the offense." *Holland v. State*, 705 So. 2d 307, 326 (Miss. 1997); *see also McDuff v. Johnson*, No. 98-51022, 1998 WL 857876, *8 (5th Cir. Nov. 17, 1998)). Mitigating evidence includes Mr.

Flowers's good behavior while incarcerated. *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986). And when assessing future dangerousness for the purpose of sentencing, the jury is permitted to "give meaningful consideration and effect to a petitioner's good behavior in prison." *Pierce v. Thaler*, 604 F.3d 197, 207 (5th Cir. 2010) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 177-178, 185-186 (1988)).

While Mr. Flowers was being transported from a hearing before Judge Morgan in Kosciusko, Mississippi to the Carroll County Correctional Facility in Vaiden, Mississippi, Mr. Flowers was permitted to eat with his parents, unsupervised by guards, including Mr. Herman Bailey, at the McDonald's restaurant in Kosciusko. This is compelling evidence that Mr. Flowers was regarded as not being dangerous in the professional opinion of the officers entrusted with transporting Mr. Flowers. Additionally, Ms. Mary Cotton, as the Case Manager in Unit 29-J, where Mr. Flowers is housed, has interacted with Mr. Flowers consistently throughout his incarceration. Ms. Cotton has access to Mr. Flowers's disciplinary records as well as personal knowledge of his good conduct as an inmate. However, Ms. Cotton has stated that the State of Mississippi has a Mississippi Department of Corrections ["MDOC"] policy that prevents her from making a written statement regarding Mr. Flowers's conduct in prison, despite the fact that she regards him as a model prisoner. The State of Mississippi cannot prevent witnesses from providing evidence in this way; in any other context, interfering with witnesses in this way would be considered obstruction. In addition, MDOC has additional records in its possession, custody, or control attesting to Mr. Flowers's conduct while incarcerated. Mr. Flowers's good behavior—evidenced by the benefits he received while incarcerated and exhibited in the dearth of disciplinary infractions in his record over a span of 13 years prior to his sixth trial—is mitigating evidence that should have been presented in full to the jury when

he was sentenced. This evidence of Mr. Flowers's good character and lack of future dangerousness was never sought by counsel, nor disclosed by the State, prejudiced Mr. Flowers in terms of the sentence he received, and is highly relevant to Mr. Flowers's ineffective assistance of counsel claims.

Request #33. MDOC Records

Mr. Flowers respectfully requests that the Court authorize him to issue a subpoena for records in MDOC's possession, custody, or control regarding Mr. Flowers's freedom of movement and disciplinary record throughout his incarceration.

Request #34. Herman Bailey's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Mr. Herman Bailey to inquire as to the Mr. Flowers's freedom of movement during his 15 years of incarceration prior to his operative conviction, as well as who was aware of these movements.

Request #35. Mary Cotton's Deposition Testimony

Mr. Flowers respectfully requests that the Court grant leave for him to issue a subpoena to depose Ms. Cotton to inquire as to Mr. Flowers's disciplinary record and conduct throughout his incarceration.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Flowers respectfully requests that the Court order the Requested Discovery.

Respectfully submitted this the 7th day of December, 2018.

CURTIS GIOVANNI FLOWERS, Mr. Flowers

By: _____

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CERTIFICATE OF SERVICE

The undersigned attorney for Curtis Giovanni Flowers hereby certifies that he has caused to be mailed by electronic mail and by U.S.P.S. mail, postage prepaid, a true and correct copy of the above motion to:

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This the 7th day of December, 2018

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